TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 598

PEOPLE OF THE STATE OF MICHIGAN, BY JOHN S. HAGGERTY, SECRETARY OF STATE, PETITIONERS,

vs.

MICHIGAN TRUST COMPANY, RECEIVER OF WORDEN GROCER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 28, 1931

CERTIORARI GRANTED FEBRUARY 15, 1932

(36,412)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 3, 1932

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IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. 2051. Equity

WOOLSON SPICE COMPANY

vs.

WORDEN GROCER COMPANY

In the Matter of the Petition of the PEOPLE OF THE STATE OF MICHIGAN

BILL OF COMPLAINT—Filed February 9, 1926

To the Judges of the District Court of the United States for the Western District of Michigan, Southern Division, Sitting in Equity:

Your orator, The Woolson Spice Company, brings this, its bill of complaint, against Worden Grocery Company, defendant herein, and humbly complaining, respectfully shows unto your Honors as follows:

I

Your orator, The Woolson Spice Company, is a corporation organized and existing under the laws of the State of Ohio, with its principal office for the transaction of business in the City of Toledo, in said State of Ohio, and for a number of years last past has been and now is a citizen of the State of Ohio and a resident and inhabitant of the City of Toledo, in said State of Ohio.

II

Worden Grocer Company, defendant herein, is, and for more than twenty years last past has been, a corporation organized and existing under and by virtue of the laws of the State of Michigan, having its principal office for the transaction of business at the City of Grand Rapids in said State. During all that time it has been and now is a citizen

of the State of Michigan and a resident and inhabitant of the Southern Division of the Western District of said State of Michigan.

[fol. 2]

III

Your orator is a creditor of said defendant Worden Grocer Company upon open account. The amount of your orator's claim now unpaid is the sum of $3,344.14.

IV

The defendant, Worden Grocer Company, is now and for many years last past has been engaged in the wholesale grocery business at said City of Grand Rapids, Michigan. Its corporate Charter was about to expire in or about the month of January, 1925, but in the year 1924 and prior to the expiration of said Charter the same, by proper legal vote of its stockholders, was extended for an additional thirty years. Your orator further avers, on information and belief, that the capital stock of said Worden Grocer Company issued and outstanding is in the neighborhood of $1,200,000, of which the majority is perferred stock. Your orator further avers that said perferred stock would have matured and been payable in or about January, 1925, had it not been that many of the stockholders of said defendant Company, in the year 1924, voted to extend the maturity thereof for an additional thirty years or thereabouts. Your orator further avers, on information and belief, that certain of the preferred stockholders of Worden Grocery Company did not vote for such extension of maturity of preferred stock and did not otherwise consent thereto. Your orator avers on information and belief, that certain of said preferred stockholders who did not consent to the extension of maturity of the preferred stock held by them, have from time to time insisted that the defendant company retire the same and pay such stockholders the full par value of such stock, together with interest or dividend thereon at seven per cent annum to the date of payment; and that approximately $170,000.00 of such preferred stock which had so matured has been taken up from the former holders thereof. Your orator further avers, on information and belief, that there are other holders of preferred stock, the maturity of

which has not been extended, who are demanding payment of the par value of their stock with interest, and your orator fears that Worden Grocery Company may pay and retire such stock out of its assets instead of applying such assets to the payment of its creditors who have a prior claim thereto.

[fol. 3] V

Your orator further avers that some time ago the defendant, Worden Grocer Company, organized a subsidary corporation under the laws of Michigan, known as Worden Realty Company, and that all, or the greater part of the stock of said Worden Realty Company is owned by said Worden Grocer Company. Your orator further avers, on said information and belief, that all, or a large part of the real property of Wroden Grocer Company was by it transferred to said Worden Realty Company. Said real estate is located in the cities of Grand Rapids, Lansing, Battle Creek and Kalamazoo, in the State of Michigan. After the organization of said Worden Realty Company and its acquisition of said property, the same or the greater part thereof was mortgaged to the Grand Rapids Trust Company, of Grand Rapids, Michigan, as Trustee, to secure a bond issue of Worden Realty Company. Your orator avers, on information and belief, that the value of said real property far exceeds the amount of said mortgage and bond issue now unpaid. Said mortgage contains provisions permitting the release of parts of the property secured thereby upon the payment of sums specified therein, to said Trustee, said Worden Grocer Company is no longer occupying the property outside of the City of Grand Rapids, and such property should be disposed of at reasonable prices in excess of the amounts mentioned in said mortgage for the release thereof, so that there will be a surplus therefrom for Worden Grocer Company as stockholder of Worden Realty Company, and to be used for the benefit of the creditors of Worden Grocer Company. Your orator fears that Worden Grocer Company, as the principal or sole stockholder of Worden Realty Company, may permit said properties to be sold at less than their full value, or will permit said mortgage to become default so that said properties may be sacrificed without any surplus being derived there-

from for the benefit of the creditors of Worden Grocer Company. Said Worden Grocer Company, as is more particularly hereinafter set forth, is in an embrassed financial condition and may be unable to continue to pay rent upon the real property in Grand Rapids owned by Worden Realty Company and occupied by Worden Grocer Company, and if such default in re-tal should occur, said Worden Realty Company may not be able to make payments of interest or principal upon its said mortgage and bond issue, and fore- [fol. 4] closure may result from such default. Your orator avers that in the last financial statement available to it of Worden Grocer Company, being that of date November 30, 1924, the Worden Realty Company stock owned by Worden Grocer Company was valued at $364,150, the same being in substance the value of said real property over and above the amount of the mortgage thereon.

VI

Your orator further avers, on information and belief, that said Worden Grocer Company is indebted upon bills payable in the sum of approximately $100,000. Your orator further avers, on information and belief, that said Worden Grocer Company is indebted upon accounts payable to numerous creditors, including your orator, in the sum of approximately $300,000. Your orator further avers that in the statement of the assets and liabilities of said Worden Grocer Company, of date November 30, 1924, Worden Grocer Company valued its assets at upward of $1,275,000 more than its liabilities excluding capital stock. In such statement, however, the merchandise inventory of said Worden Grocer Company was valued at upward of $950,000 and your orator avers, on information and belief, that said inventory at present is carried at about $700,000 but that the actual value thereof is far less than the inventory value carried on the books. Your orator has been unable to obtain a copy of any audit of said Worden Grocer Company, or of any financial statement more recent than November 30, 1924. However, said Worden Grocer Company has permitted the indebtedness due your orator to remain overdue, and your orator avers, on information and belief, that there is a larger amount of other indebtedness overdue and

that all, or the greater part of the holders of bills payable of Worden Grocer Company will refuse to renew the same.

VII

Your orator avers, on information and belief, that the Worden Gorcer Company is solvent and that if its assets are properly conserved and its business completely handled, free from the interference of creditors, it will be able to pay its debts, including the indebtedness due your orator, and after the payment of the same, to pay also such preferred stock, if any, as has matured, leaving a surplus for its other stockholders. Your orator further avers that said Worden Grocery Company has within the last year or more, [fol. 5] discontinued its branches outside of the City of Grand Rapids and that its remaining business should be operated at a profit, if the same can be continued.

VIII

Your orator verily believes that the creditors of said defendant Company whose claims are due or whose claims will shortly become due, will insist on payment of the same and unless payment is made will probably commence suits therefor, which will result in judgments against Worden Grocer Company executions issued on such judgments. The failure of the Company to pay rental to Worden Realty Company will probably result in a default upon the mortgage executed by said Worden Realty Company and a foreclosure of said mortgage at great sacrifice of the property securing the same. Your orator fears that in the event of such default of rental and default of payment upon the mortgage and foreclosure, Worden Grocer Company will be deprived of its right to occupy the real property at Grand Rapids owned by Worden Realty Company, without which said Worden Grocer Company cannot be profitably operated. If suits are brought against Worden Grocer Company, or if said Company is deprived of the right to occupy said real property at Grand Rapids, or if said property of Worden Realty Company is sold at a sacrifice at foreclosure sale or otherwise, the same will result in great loss to Worden Grocer Company and will destroy the business at said company and its opportunity to dispose of its assets

in regular course at a profit, so that its creditors may be paid. Said Worden Grocer Company has, as your orator is informed and believes, a valuable property and business if it can be kept together and conserved and operated as a going concern. But if the property of said Company or of Worden Realty Company is sold at forced sale to satisfy creditors and thus sacrifice, then your orator avers that there will not be sufficient assets of Worden Grocer Company to pay its creditors. Your orator shows unto the court that the interests of the creditors of Worden Grocer Company, and those of its stockholders as well, will be best subserved if a receiver be appointed to take charge of the properties and business of Worden Grocer Company and with power to borrow moneys wherewith to operate the business thereof and to protect the right of Worden Grocer Company to occupy th real property at the city of Grand [fol. 6] Rapids owned by Worden Realty Company, and for such other purposes as may be necessary in order to avoid sacrifice and waste of the corporate assets.

IX

Your orator further avers, on information and belief, that if the assets of the Company are prudently managed by a Receiver and the loss and waste occosioned by litigation and interruption of business prevented, there will result a fund sufficient to pay the creditors of the Company, with a surplus in addition. Whereas, if the assets of the Company and its business are not so conserved, said Worden Grocer Company will become insolvent and thereby the stockholders and creditors of said Company will suffer great loss, and that the interest of said Company and its stockholders and creditors alike demand that a Receiver be appointed for the purpose of conserving its assets.

X

Your orator further avers that the amount in controversy herein exceeds the sum of $3,000, exclusive of interest and costs, and that your orator is remediless in the premises in a court of law and has no adequate remedy, except in this court of equity.

XI

Your orator therefore prays:

(a) That Worden Grocer Company, defendant herein, may answer this bill of complaint without oath, answer under oath being hereby expressly waived.

(b) That a Receiver be appointed of said Worden Grocer Company with power to take possession of all its property, assets and business, and with full power to operate, continue and manage its properties and business, and to incur indebtedness prior to the claims of general creditors in such amount as may be necessary or proper to effect the purposes of a Receivership, or any of them, and with all the usual powers of receivers in courts of equity.

(c) That the said defendant be restrained from collecting any debts due it and from paying or transferring any of its money or property, except by the order of this court and from in any manner interfering with the Receiver appointed by this court.

(d) That an accounting be had of all debts of said [fol. 7] Worden Grocer Company and that the creditors of said Company be given an opportunity by appropriate proceedings to make proof in this cause of their respective claims against said Company; that the assets of said Company be administered by this court, and that the rights of all creditors and stockholders of said Company be determined and the assets of said Company administered as equity shall require, and that after the corporate debts are paid or secured to the satisfaction of this court, the assets of said Worden Grocer Company be restored to it.

(e) That your orator may have such other or further relief as the nature of the case may require, and as shall be agreeable to equity.

XII

May it please the court to grant to your orator the writ of injunction to be issued out of and under the seal of this court directed to said Worden Grocer Company, its officers servants and agents, enjoining and restraining them from collecting or receiving any debts due it, and from selling,

assigning or transferring any of its property, or from in any way interfering with the Receiver to be appointed by this court.

XIII

May it please the court to grant unto your orator a writ of subpœna, directed to said Worden Grocer Company, commanding it to appear and answer this bill of complaint according to the rules and practice of this court.

The Woolson Spice Company, by Julius H. Amberg, Its Attorney and Agent. Julius H. Amberg, Butterfield, Kenney & Amberg, Solicitors and of Counsel for Plaintiff. Business address: Suit 503 Michigan Trust Bldg., Grand Rapids, Michigan.

[fol. 8] *Duly sworn to by Julius H. Amberg. Jurat omitted in printing.*

We, Butterfield, Kenney & Amber, hereby acknowledge ourselves security for all costs for which the plaintiff may become liable in this suit or proceeding.

Butterfield, Kenney & Amberg, by Julius H. Amberg.

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT— Filed February 9, 1926

For answer to the Bill of Complaint filed in the above entitled matter, defendant, Worden Grocer Company, says:

1. That it admits each of the allegations contained in said Bill of Complaint.

[fol. 9] 2. That if consents to the appointment of a Receiver as in said Bill of Complaint prayed:

This Answer is signed and filed pursuant to a Resolution of the Board of Directors, a true copy of which is annexed hereto and marked Exhibit "A."

Worden Grocer Company, by E. D. Winchester, President. H. P. Winchester, Secretary. Travis, Merrick, Warner & Johnson, Attorneys for Defendant.

EXHIBIT "A" TO ANSWER

Whereas, a Bill of Complaint has been presented in which Bill of Complaint Woolson Spice Company is named as Plaintiff and this Company is named as Defendant, which Bill of Complaint is about to be filed in the District Court of the United States for the Western District of Michigan, and wherein the plaintiff asks for the appointment of a Receiver for this Company, and it appearing that the Company should file is Answer admitting the allegations in said Bill of Complaint and consenting to the appointment of the Receiver as therein prayed.

Be it resolved that the President or Vice President and Secretary, or either of them be and they are hereby authorized to sign the Answer of the Company, admitting the allegations contained in said Bill of Complaint, and consenting to the appointment of a Receiver as therein prayed:

Be it further resolved that Travis, Merrick, Warner & Johnson be and are hereby authorized to sign said Answer as attorneys for the Defendant and file the same and represent the Company in the above entitled proceedings.

I hereby certify that the foregoing is a true copy of a Resolution passed by the Board of Directors of Worden Grocer Company at a duly called meeting held on Februray 9, 1926.

H. P. Winchester, Secretary. (Seal.)

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER APPOINTING RECEIVER—Entered February 9, 1926, by Judge Raymond

This cause came on to be heard upon the bill of complaint filed therein and the answer of the defendant admitting the truth of the statements contained in said bill and consenting to the appointment of a Receiver, as therein prayed; and, on motion of Butterfield, Keeney & Amberg, Solicitors for plaintiff, and Travis, Merrick, Warner & Johnson, solicitors for the defendant, appearing and consenting to the

making of this order, this court doth order and decree as follows:

I

The Michigan Trust Company of Grand Rapids, Michigan, a corporation organized under the laws of the State of Michigan, is herby appointed Receiver of Worden Grocer Company, and of all its property, real, personal and mixed, wherever the same may be situated, and the said Receiver is hereby vested with all the property and rights, of every kind whatsoever, and whereseever situate, both legal and equitable, of Worden Grocer Company, and is vested with full power and authority to demand, collect, sue for and take into its possession, all the chattels, rights, credits, money and effects, lands an tenements, books, papers, choses in action, and all property, of every kind and description belonging to said Worden Grocery Company, and to collect the rents, income, profits and revenues of all said property, and to institute suits at law or in equity for the recovery of any of said assets, property or demands of the Worden Grocer Company, and to prosecute or defend any suits now pending against said Company and subject to the direction of the court, to compound and settle with any debtor or creditor of said Worden Grocer Company or with persons having possession of any of its property, or with persons in any way responsible at law or in equity to said Company upon such terms and in such manner as said Receiver shall deem just and beneficial to said Company, and in case of mutual dealings between the said defendant and other persons, to allow just set-offs in favor of such persons in all cases in which the same ought to be allowed, according to law and equity; to sell, convey and assign any and all of the personal assets of said Worden Grocer Company in the ordinary course of business; to sell, convey and assign any and all of the real estate or of other personal estate of said [fol. 11] Worden Grocer Company, subject to the supervision and order of this court to be first obtained in case the sale of said assets is not in the usual course of business; to carry on the business now carried on by Worden Grocer Company, and to operate and manage its property and business in such manner as will, in the judgment of said Receiver, produce the most satisfactory results; to maintain,

preserve and protect the said property and assets, to keep the same in proper condition and repair, so that the same may be safely and advantageously operated and used; to employ and discharge and fix the compensation of all such officers and managers and agents and employees as, in the judgment of said Receiver, shall from time to time, be needed in the performance of its duties as such Receiver, and to make such payments and disbursements as may be needful and proper in so doing; to pay the current and unpaid pay-rolls of said defendant; to incur such obligations and indebtedness as such Receiver, the same to be prior to the present unsecured obligation of said Worden Grocer Company, as to the said Receiver may seem necessary for continuance of the business of said Worden Grocer Company; to pay all taxes and assessments levied upon the property and assets of said Company and to pay all rentals or other sums which have accrued or which may hereafter accure and which may be necessary in order to enable said Worden Grocer Company to continue in the occupation of the premises now occupied by it in the City of Grand Rapids, Michigan; and to do all and singular the things which a Receiver in a court of equity has authority to do.

II

The Receiver shall take possession of all the property of said defendant Company, and the said Company, its officers, agents and employees, are hereby required to turn over and deliver to said Reciever all the goods, chattels, credits, money, lands, tenements, books, papers, choses in action, and property, of every description, real and personal belonging to said defendants; and the said defendant, its officers, servants and agents, are hereby enjoined and restrained from receiving any debts due to the said defendant, or from paying or transferring any of its effects of any kind, or from interfering with said Receiver or its operation and conduct of the business.

[fol. 12]

III

The said Receiver, before entering on its duties as such Receiver, shall give a bond in the sum of Twenty five Thousand Dollars, with surety or sureties to be approved by the clerk of this court, conditioned that it will faithfully per-

form the duties of its office and account for all moneys of properties which may come into its hands, and abide by and perform all of the orders in this court in the premises.

IV

The Receiver and the parties to this cause, and any person interested in the property or affairs of said defendant, shall have leave to apply, from time to time, to this court for further instructions in the premises, all other matters and things referred to in said bill of complaint, are reserved for the further order and decree of this Court.

Approve- for entry this 9th day of February, A. D., 1926.

Fred M. Raymond, District Judge.

IN UNITED STATES DISTRICT COURT

PETITION OF THE PEOPLE OF THE STATE OF MICHIGAN—Filed Feb. 28, 1930

To the said Court:

The petition of the People of the State of Michigan by John S. Haggerty, Secretary of State of the said State of Michigan, respectfully shows unto the court as follows:

I

That on the 9th day of February, A. D., 1926, the Michigan Trust Company, a Michigan corporation, was duly [fol. 13] appointed receiver of the above named Worden Grocer Company and is now the duly qualified and acting receiver of all the assets and property of the said Worden Grocer Company.

II

That the said Worden Grocer Company is a Michigan corporation and was organized and incorporated as such on the 31st day of January, A. D., 1895, under the provisions of Act No. 232, Public Acts of 1885 of the State of Michigan, with its principal office and place of business at the City of Grand Rapids in the said State of Michigan.

III

That Section 5 of Chapter 2 of Part V of Act No. 84, Public Acts of 1921 of the State of Michigan requires that:

"Every corporation organized for pecuniary profit, • • • shall annually, in the month of July or August file a report in duplicate with the secretary of state showing its condition at the close of business upon the thirty-first day of December, or upon the date of the close of its fiscal year, next preceding, on suitable blanks to be furnished by the secretary of state as hereinafter provided: • • • Such report shall furnish the secretary of state with all information and facts necessary for the computation of the annual franchise fee provided by law. • • •"

IV

That Section 4 of Act No. 85, Public Acts of 1921 of the State of Michigan, as originally enacted, read as follows:

"Every corporation organized or doing business under the laws of this state, excepting those hereinafter expressly exempted therefrom, shall, at the time of filing its annual report with the Secretary of State of this state, as required by section seven hereof, for the privilege of exercising its franchise and of transacting its business within this state, pay to the Secretary of State, an annual fee of three and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than fifty dollars nor more than ten thousand dollars."

[fol. 14] That the said section was amended by Act No. 233, Public Acts of 1923, so as among other things to reduce the amount of such privilege fee from three and one-half mills upon each dollar to two and one-half mills upon each dollar. That said section was again amended by Act No. 175, Public Acts of 1929, so as to add the following statement thereto:

"It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

V

That the said Worden Grocer Company is a corporation falling within the class of corporations intended to be covered by the said above cited and quoted statutes, and has ever since the enactment of the said statutes been and is now subject to and bound by the provisions thereof. Your petitioner further shows that the said Michigan Trust Company, as receiver of the said Worden Grocer Company, did from the date of its appointment as such receiver become subject to and bound by the provisions of the said above cited and quoted statutes to the same extent as they applied to and affected the said Worden Grocer Company. That notwithstanding such liability, and notwithstanding its obligation to abide by and comply with the terms and provisions of the said statutes, the said receiver has not since its appointment filed or caused to be filed the annual reports therein provided for, and has not paid or caused to be paid the annual privilege fees therein prescribed, with the exception of the report for the year ending December 31, A. D., 1925, which was tendered the Secretary of State with a filing fee of $2.00 but without the privilege fee as required by law.

VI

That the privilege fee due your petitioner from the said receiver on the basis of the report tendered for the year ending December 31, A. D., 1925, is the sum of $2,747.09, with interest thereon at the legal rate from the 1st day of September, A. D., 1926, but that your petitioner is unable to state the amounts of the privilege fees for the years ending December 31, 1926, 1927 and 1928, respectively, until [fol. 15] reports for the said years have been filed and computations made thereon. Your petitioner shows, however, that after the computation of each of the said fees, the same will bear interest from the 1st day of September of the year next following.

Your petition therefore prays that an order may be entered:

1. Requiring the said Michigan Trust Company, receiver as aforesaid, to file with the Secretary of State of the State of Michigan separate reports, supplying such information

as is required by the provisions of Act No. 84, Public Acts of 1921, as above cited and quoted, for the years ending December 31, 1926, 1927 and 1928; and that each of such reports be accompanied by a filing fee of $2.00 and by the amount of the privilege fee computed thereon, in accordance with the provisions of Act No. 85, Public Acts of 1921 of the State of Michigan as above cited and quoted.

2. That after the filing of such reports, the Secretary of State have a reasonable period of time within which to make such examination thereof as he may deem necessary or advisable, in accordance with law, for the purpose of determining the correctness of the computation of the privilege fees thereon, with leave to report to the court any error or discrepancy found therein.

3. That in the event that the receivership of the said Worden Grocer Company is not terminated prior to the 31st day of August, A. D., 1930, but is continued thereafter, said Michigan Trust Company, receiver as aforesaid, or its successor in office, file a report with the Secretary of State of the State of Michigan in accordance with the above cited and quoted acts, during the month of July or August, A. D., 1930, for the year ending December 31, A. D., 1929, and that such report be likewise accompanied by payment of the filing fee and privilege fee as required by Act No. 85, Public Acts of 1921, as aforesaid.

4. That said Receiver pay the privilege fee upon the report filed for the year ending December 31, 1925.

And your petitioner will ever pray.

People of the State of Michigan, by John S. Haggerty, Secretary of State. Wilber M. Brucker, Attorney General; Charles Rubiner, Assistant Attorney General, Attorneys for Petitioner.

[fol. 16] *Duly sworn to by John S. Haggerty. Jurat omitted in printing*

IN UNITED STATES DISTRICT COURT

OPINION OF COURT—Filed June 21, 1930

A petition has been filed herein by the State of Michigan asking that this court order the receiver to pay to the

proper state officer the annual corporation privilege fees provided for by Sec. 4 of Act No. 85 of the Public Acts of Michigan of 1921. The precise question presented is whether the receiver of a private corporation is liable to the state for privilege fees which accrue during the period of receivership. Examination of cases upon this subject discloses wide diversity of reasoning and opinion. So far as the question relates to corporations operating public utilities the decided weight of authority is that where the ordinary business of the corporation is continued by the receiver the franchise tax should be paid (see Central Trust [fol. 17] Co. v. New York City & N. R. Co., 110 N. Y. 250; New York Terminal Co. v. Gaus, 204 N. Y. 512; Armstrong v. Emmerson, 300 Ill. 54; Harvey v. Bay State Street Railway, 234 Mass. 336). Here the receiver urges that the state has no claim whatever for the payment of state privilege fees, the receiver having acquired nothing from the state in the way of rights, benefits and franchises for which it should be required to pay. Reliance for this position is chiefly upon the cases of U. S. v. Whitridge, 231 U. S. 134 and State of Ohio v. Harris (C. C. A. 6) 229 F. 892. It is argued that such cases as Liberty Trust Co. v. Gilliland Oil Co., 279 F. 432; Providence Engineering Corp. v. Downey Shipbuilding Corp., 8 F. (2d) 304; People v. Hopkins, 18 F. (2d) 731; and in re Malko Milling & Lighting Co., 32 F. (2d) 825, in which it was held that receivers of private corporations are liable to pay the privilege fee, are distinguishable.

Nothing is to be gained by an attempt to classify the cases upon this subject. Many of them have been analyzed and distinguished so far as possible in an annotation to the case of Armstrong v. Emmerson found in 18 A. L. R. 700. The excise tax considered in U. S. v. Whitridge (supra) was not one imposed upon the privilege of exercising the corporate franchise but upon the doing of business by the corporation. Here the tax imposed is "for the privilege" of exercising the corporate franchise. This privilege was not surrendered at any time during the taxable period.

In the case of State of Ohio v. Harris (supra) the following language is used:

"When we thus treat the interventions alike for purposes of the tax in dispute, we appreciate the fact that we could

not do so if the receiver had during the tax years in question conducted the corporation business in the regular way; for he then would have been chargeable with having exercised the franchises. Central Trust Co. v. N. Y. C. & N. R. R. Co., 110 N. Y. 250, 257, 18 N. E. 92, I. L. R. A. 260, opinion by Judge (later Mr. Justice) Peckham."

In the present case there is no question that during the years for which it is sought to apply the privilege tax the receiver actively conducted the corporation business. The question here is whether the receiver has acquired anything from the state for which it should pay but whether the corporation whose entire assets are in the custody and [fol. 18] under the control of the receiver surrendered the privilege which is acquired from the state of exercising its franchise. The bill of complaint filed in this cause asked for the appointment of receiver with power to take possession of all the property, assets and business of the corporation and with full power to operate, continue and manage the properties and business. This was consented to by resolution of the board of directors of the corporation, the resolution being adopted on the same day on which the bill of complaint was filed. There is in the bill of complaint no averment of insolvency or indication of intent either to dissolve the corporation or to wind up its affairs. There is the clear expression of the purpose or at least the expectation that when the then present emergency had passed there would be left a surplus for the corporation. The evident purpose of the bill of complaint was to have the business of the corporation continue without interruption by creditors or others and the aid of the court was invoked to prevent such interruption by what amounted in effect to the declaring of a moratorium against creditors. For the purpose of staying the hands of creditors, the board of directors surrendered its custody and control of the property of the corporation. For all other purposes it continued. The destiny of the corporation was to a considerable extent still under its control. It might have filed a petition in bankruptcy (see Struthers Furnace Co. v. Grant, 30 F. (2d) 576). When, after several years of operation, the hope vanished that the normal corporate activities might be

resumed the board of directors might have filed a formal notice of dissolution without affecting the receivership. They probably could have filed a certificate reducing the amount of its capital stock. The indisputable fact is that the corporation retained the privilege of exercising its franchise throughout the claimed taxable period and that the receivers continued to operate the business. In this case, it is undeniable that the board of directors of the corporation and the receiver (whose appointment and activities it either sought or concurred in) continued to exercise all of the privileges of the franchise of the Worden Grocer Company. (For a discussion of the history and legal status of this class of receiverships see Scattergood et al. v. American Pipe & Construction Co., 247 Fed. Rep. 712, and Harkin v. Brundage, 276 U. S. 36.)

The general attitude of federal courts towards exactions from receivers for state and municipal revenue is indicated in the cases of In re Tyler, 149 U. S. 164, 187 and Bear [fol. 19] River Paper & Bag Co. v. City of Petoskey, 241 Fed. Rep. 53, 57.

The receiver is liable and an order may be presented for signature in accordance with the prayer of the petition.

Dated June 21, 1930.

Fred. M. Raymond, District Judge.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING PETITION OF PEOPLE OF THE STATE OF MICHIGAN—Filed August 1, 1930

In this cause the petition of the people of the State of Michigan praying for an order requiring The Michigan Trust Company, receiver herein, to file certain reports with the Secretary of State of the State of Michigan and to pay certain privilege fees to the said State having been brought on for hearing; and Charles Rubiner, Assistant Attorney General, having appeared on behalf of the petitioner and Benjamin P. Merrick and Carl J. Riddering having appeared on behalf of said Receiver in opposition to the prayer of said petition but having admitted in open court the truth of the allegations of fact therein contained; and

the Court having heard the arguments of counsel and being duly advised in the premises,

It Is Hereby Ordered and Adjudged as follows:

I

On February 9, 1926, The Michigan Trust Company was duly appointed by this Court in this cause the receiver of the defendant, Worden Grocer Company, upon the plaintiff's bill of complaint and upon the defendant's answer which admitted the allegations of the bill and consented to the appointment of a receiver. Said answer and consent were authorized by the directors of the defendant by a resolution adopted on February 9, 1926.

[fol. 20]

II

At the time said receiver was appointed the defendant was a corporation existing under and subject to the provisions of Act 84 of the Public Acts of 1921 of the State of Michigan and was engaged, as it had been engaged since the year 1895, in the wholesale grocery business with principal place of business in the City of Grand Rapids, Michigan.

III

In the order appointing said receiver this Court empowered it, among other things, to carry on the business theretofore carried on by the defendant and to operate and manage the defendant's property and business in such manner as would, in the judgment of said receiver, produce the most satisfactory results. Pursuant to said order said receiver took possession of the property and assets of the defendant on February 9, 1926, and managed and operated the business continuously thenceforth until December 30, 1929, on which date this Court made an order confirming the sale of all of the mercantile assets of the defendant, effected under and pursuant to a decree of sale which had been made by this Court on November 14, 1929. Since said sale said receiver, pursuant to an order of this Court, has disbursed to the common creditors of the defendant a dividend of 25% upon their claims. At the date hereof the remaining assets in the hands of said receiver consist principally of cash and certain unsold real estate.

IV

Subsequent to its appointment said receiver tendered to the Secretary of State of the State of Michigan a report of the condition of the defendant corporation as of December 31, 1925, but said report was not accompanied by payment of the privilege fee required of corporations by Act 85 of the Public Acts of 1921 of the State of Michigan, as amended, which fee remains unpaid. Said receiver has not filed or caused to be filed with said Secretary of State any subsequent annual report setting forth the condition of the defendant corporation; and said receiver has not paid or caused to be paid to said Secretary of State any corporation privilege fee on account of the defendant corporation.

[fol. 21]

V

The provisions of Section 5 of Chapter 2 of Part V of Act 84 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the filing of annual reports by corporations organized for pecuniary profit, and the provisions of Section 4 of Act 85 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the payment of a privilege fee by corporations, are applicable to, and binding upon, said The Michigan Trust Company as receiver of Worden Grocer Company, the defendant corporation.

VI

Said the Michigan Trust Company as receiver of said Worden Grocer Company shall forthwith file with the Secretary of State of the State of Michigan separate annual reports showing the condition of said Worden Grocer Company as of the close of business upon the 31st day of December of each of the years 1926, 1927 and 1928, pursuant to the provisions of said Act 84 of the Public Acts of 1921, as amended, and shall pay to said Secretary of State a filing fee of Two Dollars ($2.00) for each of such reports filed pursuant hereto.

VII

Concurrently with the filing of such reports said receiver shall pay to said Secretary of State out of the funds

in its hands as such receiver, cash to the aggregate amount of the privilege fees due thereon and upon the report hitherto filed by said receiver, computed in accordance with the provisions of said Act 85 of the Public Acts of 1921, as amended, but without interest upon such privilege fees; and the petitioner by said Secretary of State may have a reasonable period of time, not exceeding thirty days from and after the filing of such reports, within which to examine the same for the purpose of determining the correctness of the computations thereof.

VIII

In the event of inability to agree upon the correct amount due in payment of said fees, either party may bring the matter before the Court for further consideration and determination.

Fred M. Raymond, District Judge.

[fol. 22] In United States District Court

Stipulation as to Fees—Filed August 8, 1930.

In the above entitled cause and matter, it is hereby stipulated and agreed by and between the petitioner and The Michigan Trust Company, Receiver of the defendant, through their respective attorneys, as follows:

1. That in lieu of the method prescribed in paragraphs VII and VIII of the order herein made and entered on August 1, 1930, for the future determination of the amount of the corporation privilege fees for which said Receiver was by said order adjudged to be liable to the State of Michigan, the amount of said privilege fees, for purposes of a final order in said matter decreeing payment thereof, is hereby determined by agreedment to be as follows:

For each of the four taxable years specified in said order, the amount of the unpaid privilege fee is $2,747.09; and For all of the years specified in said order the aggregate amount of the unpaid privilege fees is $10,988.36.

2. That on filing this stipulation and presentation thereof to the Court, either party may move ex parte for a final

order, as aforesaid, supplementing and modifying said order of August 1, 1930, in harmony with this stipulation.

3. That this stipulation is made and entered into by said Receiver without prejudice to, or waiver of, any of its rights of appeal from the final decision of said Court in said matter, provided, however, that the correctness of the computation of the amount, hereinbefore agreed upon, of the privilege fees, for the payment of which said Receiver has been adjudged liable, shall not be questioned upon appeal.

Dated August 7, 1930.

Travis, Merrick & Johnson, Attorneys for the Michigan Trust Company, Receiver. Wilber M. Brucker, Attorney General, Attorney for the People of the State of Michigan, by Charles Rubiner, Assistant Attorney General.

[fol. 23] IN UNITED STATES DISTRICT COURT

FINAL ORDER—Entered August 8, 1930, by Judge Raymond

In this cause the matter of the petition of the people of the State of Michigan came on to be further heard on this day at which time appeared Benjamin P. Merrick, one of the attorneys for The Michigan Trust Company, Receiver of the defendant, and moved for a final order in said matter; and thereupon, upon consideration thereof and of the written stipulation between the attorneys for said Receiver and for the petitioner in said matter dated August 7, 1930, and concurrently filed.

It was Ordered, Adjudged and Decreed as follows, namely:

I

The provisions of Section 5 of Chapter 2 of Part V of Act No. 84 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the filing of annual reports by corporations organized for pecuniary profit, and the provisions of Section 4 of Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the payment of a privilege fee by corporations, are appli-

cable to, and binding upon, said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporations.

II

Said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation, is in default in the filing with the Secretary of State of the State of Michigan of separate annual reports showing the condition of said Worden Grocer Company as of the close of business upon the 31st day of December of each of the years 1926, 1927 and 1928, pursuant to the provisions of said Act No. 84 of the Public Acts of 1921 of the State of Michigan, as amended. Said Receiver shall forthwith file said reports and shall pay to said Secretary of State a filing fee of $2.00 for each of such reports filed pursuant hereto.

III

Said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation, is in default in the payment, to the Secretary of the State of Michigan, of the several amounts of money specified below and hereby adjudged and finally determined to be [fol. 24] due to the State of Michigan at the date hereof, by way of corporation privilege fees on account of said defendant corporation, under the provisions of Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended, namely:

For the fee due and payable in July or August, 1926, the sum of	$2,747.09
For the fee due and payable in July or August, 1927, the sum of	2,747.09
For the fee due and payable in July or August, 1928, the sum of	2,747.09
For the fee due and payable in July or August, 1928, the sum of	2,747.09

Said Receiver shall forthwith pay to the Secretary of State of the State of Michigan, out of the funds in its hands as such Receiver, the sum of $10,988.36, in payment of said privilege fees, hereinabove adjudged to be due to the State of Michigan, but without interest upon said privilege fees.

IV

Insofar as the order herein made and entered on August 1, 1930 prescribed the procedure to be followed in determining the correct amount due in payment of said privilege fees, or was otherwise inconsistent with this order, it shall be deemed to be modified and superseded by this order, but shall in other respects stand confirmed.

Fred M. Raymond, District Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL BY THE MICHIGAN TRUST COMPANY, RECEIVER, AND ORDER ALLOWING SAME—Filed August 8, 1930

To the Honorable Fred M. Raymond, District Judge:

The Michigan Trust Company, Receiver of the defendant in the above entitled cause, considering itself aggrieved by the order made and entered in the above entitled cause upon the eighth day of August, A. D. 1930, in the matter of the petition of the people of the State of Michigan, hereby appeals from said order for errors assigned in the accompanying assignments of error filed herewith and prays that its appeal may be allowed; that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said order was made, may be made and duly authenticated and sent to the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio.

Your Petitioner further prays that the proper order be made relating to the security to be required of it on appeal.

And your Petitioner will ever pray, etc.

Dated August 8, 1930.

The Michigan Trust Company, Receiver of Worden Grocer Company, by Benjamin P. Merrick, One of Its Attorneys. Benjamin P. Merrick, Travis, Merrick & Johnson, Attorneys for the Michigan Trust Company, Receiver.

It is ordered that the appeal be allowed as prayed for; that the appeal bond be fixed at the sum of Five Hundred Dollars ($500); and that the bond submitted and approved, be filed herein.

Dated August 8, 1930.

Fred M. Raymond, District Judge.

[fol. 26] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed August 8, 1930

Now comes the appellant, The Michigan Trust Company, Receiver of the defendant in the above entitled cause, by Benjamin P. Merrick and Travis, Merrick & Johnson, its attorneys, and, in connection with its petition for appeal, says that in the record and proceedings in this cause in the matter of the petition of the people of the State of Michigan, and in the order made and entered therein on the eighth day of August, A. D. 1930, manifest error has intervened to the prejudice of the appellant, to-wit:

1. The Court erred in decreeing, by said order, that the provisions of Section 5 of Chapter 2 of Part V of Act No. 84 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the filing of annual reports by corporations organized for pecuniary profit, are applicable to and binding upon said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation.

2. The Court erred in decreeing, by said order, that the provisions of Section 4 of Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended, relative to the payment of a privilege fee by corporations, are applicable to and binding upon said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation.

3. The Court erred in decreeing, by said order, that said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation, is under a legal duty to file with the Secretary of State of the State

of Michigan separate annual reports showing the condition of said Worden Grocer Company as of the close of business upon the 31st day of December of each of the years 1926, 1927 and 1928, pursuant to the provisions of said Act No. 84 of the Public Acts of 1921 of the State of Michigan, as amended, and in decreeing that said Receiver shall forthwith file said reports.

4. The Court erred in decreeing, by said order, that said The Michigan Trust Company as Receiver of Worden Grocer Company, the defendant corporation, is under a legal duty to pay to the State of Michigan corporation privilege fees for the years 1926, 1927, 1928 and 1929, or [fol. 27] any of them, on account of the defendant corporation, under the provisions of Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended, and in decreeing that said Receiver shall forthwith pay said privilege fees to the Secretary of State of the State of Michigan out of the funds in the hands of said Receiver.

5. The Court erred in not holding and decreeing that, by reason of the admitted non-payment by the defendant corporation of the privilege fee which became due and payable by it in July or August, 1926, and by force of the provisions of Section 6 of Chapter 2 of Part V of Act No. 84 of the Public Acts of 1921 of the State of Michigan, the corporate powers of the defendant corporation were suspended from and after September 10, 1926, and that in consequence of such suspension of powers the statutory obligation of the defendant corporation to file annual reports thereafter was likewise suspended and nullified.

6. The Court erred in not holding and decreeing that, by reason of the admitted neglect of the defendant corporation for two consecutive years, namely, 1926 and 1927, to file the annual report and to pay the annual privilege fee, as required by the statutes of the State of Michigan, the charter of the defendant corporation, by force of the provisions of Act No. 172 of the Public Acts of 1923 of the State of Michigan, became void on, to-wit, August 31, 1927, and that in consequence thereof neither the defendant corporation nor its Receiver was thereafter under any legal duty to file any subsequent annual report or to pay any subsequent privilege fee to the State of Michigan under the provisions of Act No. 84 and Act No. 85 of the Public Acts of 1921 of the State of Michigan, as amended.

7. That the Court erred in not holding and decreeing that, by reason of the admitted neglect of the defendant corporation for two consecutive years, namely, 1927 and 1928, to file the annual report and to pay the annual privilege fee, as required by the statutes of the State of Michigan, the charter of the defendant corporation, by force of the provisions of Act No. 267 of the Public Acts of 1929 of the State of Michigan, effective August 27, 1929, (amendatory of Section 7 of Chapter 2 of Part V of Act No. 84 [fols. 28 & 29] of the Public Acts of 1921, as amended) became absolutely void without any judicial proceeding whatsoever on the date said Act No. 267 of the Public Acts of 1929 took effect, to-wit, August 27, 1929, and that in consequence thereof neither the defendant corporation nor its Receiver was under any legal duty to file the annual report or to pay the privilege fee not finally due until August 31, 1929.

Wherefore the appellant prays that the District Court of the United States for the Western District of Michigan, Southern Division, in Equity, may be directed to reverse its decree and judgment in the herein-mentioned particulars, with such further orders as Equity demands.

Dated August 8, 1930.

Benjamin P. Merrick, Travis, Merrick & Johnson,
Attorneys for Appellant.

Bond on appeal for $500.00, approved and filed August 8, 1930, omitted in printing.

[fol. 30] Citation, in usual form, showing service on Wilber Brucker, filed August 16, 1930, omitted in printing.

[fol. 31] In United States District Court

Praecipe—Filed August 18, 1930

To the Clerk of said Court:

Please Take Notice that you are requested to include in your return to the Circuit Court of Appeals for the Sixth

Circuit, upon the appeal of The Michigan Trust Company, Receiver of Worden Grocer Company, the defendant in the above entitled cause, in the matter of the petition of the People of the State of Michigan, the following papers, namely:

1. Bill of Complaint.
2. Answer of defendant.
3. Order appointing Receiver.
4. Petition of the People of the State of Michigan.
5. Opinion of Court dated June 21, 1930.
6. Order of Court dated August 1, 1930.
7. Stipulation dated August 7, 1930.
8. Final Order of Court dated August 8, 1930.
9. Petition for Appeal, and Order of Allowance.
10. Assignments of Error.
11. Bond on Appeal.
12. Citation.
13. Praecipe.
14. Clerk's Certificate.

Dated: August 8, 1930.

Yours, etc., Travis, Merrick & Johnson, Attorneys for Appellant.

Due and personal service of the within praecipe is hereby acknowledged and I join therein.

Wilber M. Brucker, Attorney General, Attorney for the People of the State of Michigan, by Charles Rubiner, Assistant Attorney General.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed August 27, 1930)

J. W. MENZIES,
Clerk of said Court:

Please enter my appearance as Counsel for the Appellant.

BENJAMIN P. MERRICK,
TRAVIS, MERRICK & JOHNSON
of Counsel

CAUSE ARGUED AND SUBMITTED

(January 9, 1931—Before: DENISON, HICKS and HICKENLOOPER, JJ.)

This cause is argued by B. P. Merrick for Appellant and by Charles Rubiner for Appellee and is submitted to the court.

JUDGMENT

(Filed October 8, 1931)

Appeal from the District Court of the United States for the Western District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this court.

OPINION

(Filed October 8, 1931)

Before DENISON, HICKS and HICKENLOOPER, Circuit Judges.

HICKENLOOPER, Circuit Judge: On February 9, 1926, appellant was appointed receiver for the Worden Grocer Company, a Michigan corporation, and operated the business under orders of the court until December 30, 1929, at which time all mercantile assets were sold. The only question presented upon this appeal is whether during this period of operation the receiver became obligated, annually, to pay the so-called Michigan Franchise Tax, for or on behalf of the Worden Grocer Company, which taxes had not been assessed at the time of the appointment of the receiver but were subsequently levied "for the privilege of exercising its franchise and of transacting its business within this state." Section 4, Act No. 85, Public Acts of 1921.

Although measured by the amount of the corporation's "paid-up capital and surplus", the tax is obviously not a tax upon the property of the corporation, but an excise tax upon the privilege of doing business in corporate form. *Educational Films Corp.* v. *Ward*, 282 U. S. 379; *in re Detroit Properties Corp., et al.*,—Mich.—(decided June 1, 1931), 236 N. W. 850. In the decision last cited practically all of the authorities upon our main issue are collected, and it would seem useless to review them here in detail, although we shall, of course, refer to many, and shall express our views as to their proper classification.

In re Detroit Properties Corporation also recognizes that a proper decision of this issue depends upon whether the receiver, by operating the business, exercised or used any of the franchises of the corporation.[1] This is mani-

[1] No question of the construction of a state statute by the highest court of the state was there or is here involved. We do not therefore consider whether it is within the power of the state to levy a tax upon the receivers of the property of private corporations, measured by the amount of the outstanding capital and surplus, but without regard to the exercise by the receiver of any of the franchises of the corporation, or whether such a tax would be valid as to those receivers appointed by a federal court, as distinguished from those appointed by the state courts.

festly the proper criterion to apply. If he did, liability to the tax would be the liability of the receiver and the fee must be paid by him. If he did not use any of the franchises of the corporation, it is extremely difficult, if not impossible, to justify the imposition of a tax against the receiver, as such. It is true that the corporation itself might remain liable to an annual tax upon the franchise "to be" a corporation, or even upon the franchise "to do" business in corporate form, until the corporation was actually dissolved, a distinction given much weight by the Supreme Court of Michigan, but the receiver takes the property charged only with the debts and liabilities of the corporation, liquidated or unliquidated, which exist at the time of his appointment. It would be immaterial in every case whether the corporation might be held independently liable for taxes thereafter accruing, except and unless the properties or some part thereof were subsequently returned to it or a surplus was distributable to stockholders. Otherwise there would be nothing from which the tax could be paid. The corporation would be but an empty shell.

Relying upon the supposed distinction between a tax upon the "privilege" of exercising the franchise "to do", and a tax upon the franchise "to be", the opinion in *In re Detroit Properties Corporation* concludes that inasmuch as a receiver normally may conduct only such business as the corporation was theretofore authorized by charter to transact, such receiver is exercising the corporation's franchise "to do." Compare, also, *In the Matter of George Mather's Sons Co.*, 52 N. J. Eq. 607. This would seem a *non sequitur* where the corporation had been engaged in purely mercantile pursuits "for franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right." *Bank of Augusta* v. *Earle,* 13 Pet. 519, 595. A receiver "is a mere arm of the court appointing him." *Converse* v. *Hamilton,* 224 U. S. 243, 257. "Immediately upon such appointment and after qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature." *Atlantic*

Trust Co. v. *Chapman,* 208 U. S. 360, 370; *Booth* v. *Clark,* 17 How. 322, 331. Not only, in the case of mercantile corporations, is the franchise "to do" inseparable from the franchise "to be", and necessarily implied from a grant of the latter franchise, and the distinction therefore somewhat vague, but no good reason appears in such a case why the receiver may not perform, under direction of the court, any act which might be performed by any other citizen, in total disregard of the corporate capacity of the former possessor of the property, and without any reliance whatever upon its franchises. The property is no longer under the control of the corporation. The court and the receiver need no grant from the state of "special privileges" to effect a disposition of such property in accordance with the rules of law and equity. The limitation that the receiver may normally transact only such business as is authorized by the corporate charter, arises from the implied contract between the corporation and its stockholders that the money invested shall be used only for such purposes, not from any dependence by the court upon the grant of the powers enumerated by the charter.

The suggested distinction is well enough in the case of a public utility. "No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived." *California* v. *Pacific R. Co.,* 127 U. S. 1, 40. Such a franchise is not included in the simple grant under general laws of the right to be a corporation. It is separate and apart from the franchise "to be". Thus, when a receiver is appointed for such public utility, and such receiver proceeds to operate the business, in a very accurate sense he is using the franchise "to do" formerly exercised by the corporation. This is quite plainly suggested by some of the decisions involving railroad or other public utility receiverships. *Collector of Taxes* v. *Bay State St. Ry.,* 234 Mass. 336; *N. Y. Terminal Co.* v. *Gaus,* 204 N. Y. 512, 516; *Armstrong, Receiver,* v. *Emmerson, Sec'ty of State,* 300 Ill. 54; *Phila. & R. R. Co.* v. *Commonwealth,* 104 Pa. St. 80. It is the proper ground, we think, upon which other similar cases should have been decided, al-

though both groups are often rather loosely cited as authority for the proposition that a franchise tax is payable wherever the receiver continues to operate the business, regardless of its nature. Compare: *Bright* v. *Arkansas*, 249 Fed. 950 (C. C. A. 8); *State* v. *Bradley*, 207 Ala. 677; *Central Trust Co.* v. *N. Y. C. & N. R. Co.*, 110 N. Y. 250.

Several other lines of authority, clearly distinguishable in principle, are also relied upon by the appellee. In *McFarland* v. *Hurley*, 286 Fed. 365 (C. C. A. 5) and *Liberty Central Trust Co.* v. *Gilliland Oil Co.*, 279 Fed. 432 (D. C., La.), corporation franchise taxes, as such, were not involved. An oil severance tax was imposed by statute. Obviously, if the severance be made by a receiver, such receiver is directly and primarily liable for the payment of the tax. The question here presented was not there involved. *In U. S. Car Co. Case*, 60 N. J. Eq. 514, the corporation is held bound to perform the statutory conditions as long as it remains in possession of the privilege. "The sole test * * * is the existence or nonexistence of the corporation." No consideration whatever is there given to whether the assessment is properly against, and collectible from, the receiver, or whether it should more properly be against the corporation and collectible only if and when such corporation again comes into the possession and control of its property. *Duryea* v. *American Wood Working Mach. Co.*, 133 Fed. 329 (C. C., N. J.) and *Conklin* v. *U. S. Shipbuilding Co.*, 148 Fed. 129 (C. C., N. J.) add nothing to our knowledge of this subject. No reasons beyond citing the *U. S. Car Co. Case* are given.

Several cases of mercantile corporation receiverships boldly announce the broad rule that the franchise tax is payable by the receiver whenever he continues to operate the business. *Savings Co. v. Motor Co.*, 116 O. S. 95, 101; *People* v. *Hopkins*, 18 F. (2d) 731 (C. C. A. 2); *Ohio* v. *Harris*, 229 Fed. 892 (dictum) (C. C. A. 6). These cases, we think, are the result of blindly following an apparent mass of precedent (often inaccurately thought out and expressed) without careful analysis of the facts of such cases, or a determination of the sound-

ness of reason underlying the decision in each. We feel under no obligation to follow this lead.

In cases in bankruptcy, although this is generally said to be by virtue of §64 of the Bankruptcy Act (11 U. S. C. §104), franchise taxes which had not accrued at the time of filing the petition are not thereafter collectible from the receiver. *N. J.* v. *Anderson,* 203 U. S. 483; *N. Y.* v. *Jersawit,* 263 U. S. 493; *Bates* v. *Archer,* 288 Fed. 182 (C. C. A. 6). These cases impliedly recognize a limitation upon the right of the State to tax a franchise which is not in present enjoyment. So, also, where the receiver does not operate the business, or is appointed in proceedings to dissolve an insolvent corporation, or an injunction has issued against the corporation, restraining the further transaction of business by it, the same rule is applied. *Ohio* v. *Harris, supra; Commonwealth* v. *Lancaster Savings Bank,* 123 Mass. 493, 496; *Johnson* v. *Johnson Bros.,* 108 Me. 272; *State* v. *Bradford Savings Bank,* 71 Vt. 234; *Greenfield Savings Bank* v. *Commonwealth,* 211 Mass. 207. But we fail to see the controlling effect of the nature of the proceeding upon the question of whether the receiver is in fact using, or is not using, any of the franchises of the corporation.

Finally, upon the subject of whether receivers of mercantile corporations do exercise the corporate franchises, the language of the Supreme Court in *United States* v. *Whitridge,* 231 U. S. 144, 149, seems to us controlling: "True, they [the receivers] may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges." We conclude that here, also, the receiver cannot be said to have used or exercised any of the corporate franchises.

It is contended of this decision, as shown by the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, that under the federal Corporation Tax Law of 1909 the tax was imposed, not upon the franchises of the corporation irrespective of their use in business, but upon the actual doing of corporate business with all the advantages that inhere in such organizations; while here the tax is upon "the privilege" of engaging in such business. This is a distinction without a difference so far as regards a continuance of the existence of the "privilege" to do business. If the right or privilege to continue its corporate business is terminated or lost, and the receiver is not exercising that franchise, but rather powers otherwise acquired, there is no foundation upon which the tax may operate; and to all practical intents and purposes the corporation which has been shorn of all its property and facilities by a receivership has, for the period of the receivership, been ousted of its *privilege* to do business in corporate form, as well as of the actual conduct of its business, as completely as if an injunction had issued or the corporation had been placed in dissolution. *Ohio* v. *Harris, supra.* Thus the rationale of the decision in *United States* v. *Whitridge, supra,* applies in all its force to the present case.

The dictum in *Ohio* v. *Harris, supra,* is disapproved, the decree of the District Court is reversed, and the cause is remanded for further proceedings. Should it appear that a surplus over indebtedness was payable by the receiver to stockholders, for and on account of their stock holdings, such fund would be chargeable with the claim of the State for franchise taxes, for, to this end alone, the corporate existence must be regarded as continued for the stockholders' benefit. But the State may share in the distribution of assets only if and after other creditors and the expenses of the receivership are paid in full. The holders of such claims neither had nor now have any possible interest in the preservation of the franchise. As to them the claim of the State is without that equity which would exist were the stockholders to benefit.

Reversed and remanded.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Michigan Trust Company, Receiver, etc.*, v. *The People of the State of Michigan*, No. 5745, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 12th day of November, A. D. 1931.

J. W. MENZIES,
[SEAL] Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[fol. 41] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed February 15, 1932.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,412. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 598. People of the State of Michigan, by John S. Haggerty, Secretary of State, petitioners, vs. Michigan Trust Company, receiver of Worden Grocer Company. Petition for a writ of certiorari and exhibit thereto. Filed December 28, 1931. File No. 36,412.